

Wed, 05/25/2022 11:26:53 AM SERB
**Muskovitz
Lemmerbrock LLC**
ATTORNEYS AT LAW



Susannah Muskovitz

muskovitz@mllabor.com

May 25, 2022

VIA EMAIL (ULP@serb.state.oh.us)

Ms. Judy Knapp
Labor Relations Specialist
State Employment Relations Board
65 East State Street, 12th Floor
Columbus, Ohio 43215-4213

RE: Bryan J. Pesta v. American Association of University Professors –
Cleveland State University Chapter
SERB Case No. 2022-ULP-04-0045

Dear Ms. Knapp:

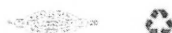
Please accept this letter as the position statement for the American Association of University Professors – Cleveland State University Chapter (“CSU-AAUP” or “Union”), in response to the Unfair Labor Practice (“ULP”) charge filed by Dr. Bryan J. Pesta on April 26, 2022 alleging a violation of O.R.C. 4117.11(B)(6).

A. INTRODUCTION

The bargaining unit was certified by SERB on December 16, 1993, Case No. 93-REP-05-0108. As provided under Article 1, Section 1.2 of the current (2021-2024) Collective Bargaining Agreement (“CBA”), the bargaining unit consists of the following:

The unit consists of all full-time faculty having the academic rank of Instructor, Assistant Professor, Associate Professor, or Professor with the following exceptions: It does not include all faculty whose primary appointment is in the Cleveland-Marshall College of Law, adjunct, visiting, part-time faculty, lecturers, emeriti and other retired faculty, and all managerial employees, including the President, the vice presidents, deans of colleges, assistant deans, associate deans, assistants to the President and the vice presidents, chairs of academic departments, and all other employees. The unit also includes Clinical Faculty as defined in Article 12.5, all eligible College Lecturers in Article 12.2D and Professors of Practice as defined in Article 12.3 E and all eligible Research faculty as defined in Article 12.5 A 6.

The BF Keith Building | 1621 Euclid Avenue, Suite 1750 | Cleveland, OH 44115
p 216-621-2020 | f 216-621-3200 | www.mllabor.com



Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
& Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 2 of 21

A. Managerial employees are those whose faculty responsibilities account for less than 50% of total responsibility.

(Union Exh. 1, pg. 1).

There was a CBA dated August 16, 2017 through August 15, 2020. (Union Exh. 2). The Union and Cleveland State University ("University" or "CSU") negotiated a One-Year Extension for the term August 16, 2020 through August 15, 2021. (Union Exh. 3). The parties then negotiated a new three-year agreement, for the term August 16, 2021 through August 15, 2024. However, the negotiations for the 2021-2024 CBA did not conclude until February 22, 2022, after both the Union and the University certified to SERB that they had both accepted the Fact-finding Report in accordance with O.R.C. Section 4117.14(C)(6). (See February 22, 2022 letter from Mary Laurent, attached at Union Exh. 4). The final CBA then had to be drafted and was eventually signed on April 11, 2022. (Union Exh. 1, pg. 93).

Article 8 of both the 2017-2020 and the 2021-2024 CBAs are titled Sanction and Dismissal. Article 9 of both CBAs are titled Grievance and Arbitration. The 2020-2021 One-Year Extension did not change any language in Articles 8 or 9. There were substantive changes to Article 8 in the 2021-2024 CBA but no changes to Article 9.

The discipline issued against Dr. Pesta was governed by the language from Article 8 of the 2017-2020 CBA. However, the language changes in the 2021-2024 CBA would not have affected the actions of the CSU-AAUP or the discipline process, at issue in this case.

No grievance was filed by either Dr. Pesta or by the CSU-AAUP in this case.

B. STATEMENT OF FACTS

Dr. Pesta is a professor in the Department of Management in the University's College of Business. He is a member of the bargaining unit. Dr. Pesta has been charged with research misconduct as a result of his misuse of controlled data from the database of the National Institute of Health, a division of the United States Department of Health and Human Services ("NIH") and for engaging in unethical research practices including the misrepresentation of the intended use of the data sets. (Union Exh. 5, pg. 1).

On August 30, 2019, the Multidisciplinary Digital Publishing Institute ("MDPI") published a paper in the open access journal "psych" titled "Global Ancestry and Cognitive Ability" which Dr. Pesta co-authored in his capacity as a professor at Cleveland State

Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 3 of 21

University. (Union Exh. 6). The paper allegedly misused and misrepresented NIH genetic data to compare the differences in intelligence between European-Americans and African-Americans. The paper promoted the conclusion that European-Americans are intellectually superior to African-Americans, and that the difference is genetic.

In September 2019, the University received allegations from four graduate researchers from the University of Washington, Baylor University, Michigan State University, and the University of Washington. The allegations raised serious issues regarding Dr. Pesta's misuse of NIH genetic data. Specifically, the graduate researchers alleged that Dr. Pesta misrepresented his intended use of NIH genetic data, that he used the data to pursue unethical research activity, and that he improperly allowed others access to controlled-access data. (Union Exh. 5, pp. 2, 14-15).

On April 8, 2021, CSU President Harland Sands received an email from Dr. Kent Taylor, Professor of Pediatrics at UCLA School of Medicine, stating that it has come to his attention that two individuals associated with CSU, Dr. Pesta and John Fuerst, co-authored a paper published in 2019 which used NIH data for studies of racial differences based in genetics. Dr. Taylor stated that the use of NIH data for such a study was both a violation of the data use agreement and unethical. He wanted to know who from CSU signed off on the data access request to NIH and where Human Subjects review occurred by a qualified institutional review board. He stated "As a genomic research investigator I am shocked that data we work so hard to collect on behalf of NIH is used in this way in violation of data use agreements and I would appreciate your help in locating the person responsible." President Sands immediately forwarded the email to [then] University Provost Jianping Zhu and to University Senior Vice President for Research and Innovation, Dr. Forrest Faison III, and asked them to "follow up as appropriate." (Union Exh. 5, pp. 24-25).

These allegations were also presented directly to NIH, which conducted its own investigation. On May 27, 2021, Dr. Faison received a letter from Dr. Michael Lauer, the NIH Deputy Director for Extramural Research and Director of the NIH Office of Extramural Research, notifying the University that Dr. Pesta was in violation of the Data Use Certification agreement he signed when he obtained access to controlled access data from the NIH. (Union Exh. 5, pp. 16-19). According to the letter, the NIH learned about potential violations in September, 2019 (presumably from the four graduate researchers from the University of Washington, Baylor University, Michigan State University, and the University of Washington). On September 19, 2019, the NIH contacted Cleveland State University and Dr. Pesta to notify them of the potential violations and to request additional information. Thereafter, the NIH conducted a review of the potential violations, and issued findings. In the findings, the NIH found serious research misconduct had been committed by Dr. Pesta. After listing the violations, the NIH stated:

Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 4 of 21

These violations, taken together, constitute a serious violation of the DUC [Data Use Certificate] agreements. Furthermore, the use of the data described in the publication and pre-prints arising from these projects raises the potential for harm to research participants, their families, and groups of which they may be members. This use is contrary to the principles of the NIH Genomic Data Sharing (GDS) Policy.

NIH takes the stewardship of genomic data and the protection of human research participants' interests very seriously, and all Approved Users and their institutions must adhere to the terms of the DUC agreement. *This incident causes NIH to be concerned about whether CSU staff have been properly guided and trained in how to responsibly handle scientific data and how to adhere to terms and conditions agreed to when accessing controlled access data.*

(Union Exh. 5, pg. 18, emphasis added). In other words, the findings of the NIH not only implicated improper actions of Dr. Pesta, but also called into question Cleveland State University itself and its practices surrounding scientific data.

The NIH then listed actions which were required by the University. Among those actions required were to immediately destroy all data and derivatives of the data that were improperly obtained. The NIH also required the following from the University:

Provide an update on all actions that CSU has taken to-date to address the inappropriate use of the controlled access to data, and what measures CSU will put in place to prevent such violations going forward. Describe what steps you currently take to train your staff in the responsible handling of scientific data and what further actions you are planning in light of this incident.

(Union Exh. 5, pp. 18-19).

Following those findings, both the University and Dr. Pesta had a right to appeal the NIH findings. On July 11, 2021, Dr. Pesta filed an appeal. By letter dated August 17, 2021 from Dr. Lauer to Dr. Pesta, the NIH denied Dr. Pesta's appeal. (Union Exh. 5, pp. 20-23).

Dr. Pesta never notified the CSU-AAUP of the investigation that had been conducted by the NIH, nor requested any representation in the investigation. (See affidavit



Wed, 05/25/2022 11:26:53 AM SERB



Ms. Judy Knapp
May 25, 2022
Page 5 of 21

of CSU-AAUP President Linda Quinn; Union Exh. 7, para. 3; affidavit of CSU-AAUP Grievance Officer Birch Browning; Union Exh. 8, para. 3).

Ohio Administrative Code 3344-2801 through 3344-2810 is the University's Research Misconduct Policy. (Union Exh. 9). The Policy clearly outlines the steps the University is required to follow when it is faced with allegations of research misconduct. Under the Policy, the University is obligated to conduct an investigation. Following the receipt of the NIH findings on May 27, 2021, the University's Research Integrity Officer, Dr. Benjamin Ward, determined that the University was obligated to investigate the allegations. In accordance with the Policy, the University was required to establish an Investigation Committee. The Committee was issued a Charge to determine if Dr. Pesta committed research misconduct by a preponderance of the evidence as established by finding that:

1. Research misconduct, as defined in the Policy, occurred. Dr. Pesta has the burden of proving by a preponderance of the evidence any affirmative defenses raised, including honest error or a difference of opinion;
2. The research misconduct is a significant departure from accepted practices of the relevant research community; and
3. Dr. Pesta committed the research misconduct intentionally, knowingly, or recklessly.

(Union Exh. 5, pp. 3-4).

The Research Misconduct Policy and the role of the Investigation Committee is not referenced in the CBA. (Union Exh. 1, 2, 3). However, as will be shown, the Investigation Committee is required to provide extensive due process protections for the accused faculty member throughout the investigation. In addition, because the investigation is conducted pursuant to the University's Research Misconduct Policy, and not addressed in the CBA, the accused faculty member can be represented by the CSU-AAUP or by private counsel. (Union Exh. 7, para. 4; Union Exh. 8, para. 4).

On June 29, 2021, the Investigation Committee was created. The three members were experienced faculty holding the rank of full professor and had significant experience with research involving human subject data. One of the three committee members was a bargaining unit member and the other two were outside the bargaining unit, one being a department chair and one being an interim associate dean. (Union Exh. 5, pg. 4).

Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
& Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 6 of 21

By Dr. Pesta's own admission, he did not notify the CSU-AAUP of the NIH investigation or the investigation by the University's Investigation Committee until August 23, 2021. (See ULP Charge attachment, pg. 3).¹ Immediately upon receipt of Dr. Pesta's notification, CSU-AAUP Grievance Officer, Dr. Birch Browning, responded. In his response, Dr. Browning stated that he was including Dr. Sonya Charles, the other CSU-AAUP Grievance Officer, and CSU-AAUP [then] President Don Allensworth-Davies on his email. Dr. Browning told Dr. Pesta that he needed to know the specifics ASAP. He also asked for the correspondence and any official documents Dr. Pesta received from the administration. Dr. Browning then asked Dr. Pesta to provide his version of the circumstances and to let him know if there were any impending deadlines for a response from him. (Union Exh. 10).

On August 23, 2021, Dr. Pesta responded and said "Thank you for your willingness to help." He said he copied attorney Jay Carson on his email, and that Mr. Carson was the lawyer he retained to defend him against the charges. He also stated that, early on, he also had assistance from the Foundation for Individual Rights in Education (FIRE). He then provided some information and said he would provide more at a later time. (Union Exh. 10).

In his ULP Charge, Dr. Pesta referenced this email and added, in bold, that the Union never met with him. (See ULP Charge attachment, pg. 4). However, although Dr. Pesta suggested a meeting in his August 23, 2021 correspondence, there were many back-and-forth emails between him and the Union after that time, negating the need for a meeting. At that time, Dr. Pesta was represented by private counsel, the investigation that was being conducted was outside the parameters of the CBA, and there was no role for the CSU-AAUP to play. (See affidavit of Dr. Browning; Union Exh. 8; para. 5).

That same day, Dr. Browning responded and explained to Dr. Pesta that the Union was usually hesitant to be involved once outside counsel had been retained. He also stated, however, the following: "That being said, the union does have an interest in making sure that the Collective Bargaining Agreement is properly followed." He said that these were his personal understandings but would consult with the officers of the CSU-AAUP to make sure this was correct. He concluded by stating "We will, of course, do everything we can within our constraints and mandates." (Union Exh. 10).

In his ULP Charge, Dr. Pesta referenced this email and added, in bold, that the Union remained his exclusive bargaining agent, with a duty of fair representation. (See

¹ The actual date of the notification was August 22, 2021, but that discrepancy is not material.

Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
& Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 7 of 21

ULP Charge attachment, pg. 4). While this is clearly true, there was no role, at that time, for the Union to play. (Union Exh. 8, para. 5).

Dr. Pesta responded and stated that he would argue that the University was (or will be) violating his just cause rights, and that he wanted to exercise his Weingarten v. NLRB rights for any University interactions going forward. Dr. Browning responded that “This is exactly why I need to consult with the Executive Committee. (Union Exh. 10).

[Then] Union President Allensworth-Davies sent an email to Dr. Pesta stating that it would be helpful to know exactly what he [Dr. Pesta] was seeking from the Union so he [Dr. Allensworth-Davies] could present the request to the Union Executive Committee. He stated that they generally do not involve outside counsel until the highest level of the grievance process, and everything which occurs before that time is done in an effort to reach a resolution before escalating to legal action. He then asked: “Given that you have retained counsel, what are you expecting from the union that would be different than what your attorney can already provide?” (ULP Charge attachment, pg. 4). Dr. Pesta responded and again cited the just cause clause in the CBA and that he would like to exercise his Weingarten v. NLRB rights for any CSU interactions going forward. (ULP Charge attachment, pg. 5).

Dr. Pesta’s private attorney, Mr. Carson, then sent an email to Dr. Allensworth-Davies identifying himself as Dr. Pesta’s counsel. He stated that he encouraged Dr. Pesta to make sure the Union was aware of the situation in case there were any rights in the CBA that were implicated. He said he had represented Dr. Pesta in the NIH investigation and was also representing Dr. Pesta before the Investigation Committee. He was not asking for any assistance at that time but wanted the Union to be aware of the situation in the event there were any violations of the CBA. (ULP Charge attachment, pg. 5).

Then on August 30, 2021, Dr. Browning sent an email to Dr. Pesta, with a copy to Dr. Allensworth-Davies and Dr. Charles. In his email, Dr. Browning stated that he had consulted with the CSU-AAUP Executive Committee and reiterated that it was the Union’s interest in this case, and every case, to ensure that the CBA, along with any policies that are derived from the CBA, are followed scrupulously. He then stated that the CSU-AAUP has no role in the research misconduct investigation but that, as a member of the bargaining unit, Dr. Pesta had the right to request union representation in any inquiry or meeting that may result in discipline or sanction that occurs within the investigation process. He told Dr. Pesta that if he requested representation at a meeting, that he [Dr. Browning] would accompany him or attend virtually provided the meeting did not conflict with his teaching responsibilities. He said that in the event the deciding officer recommended sanctions, that the Union would vigorously defend the policies and procedures, including the “just cause”

Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 8 of 21

clause. He also stated that the Executive Committee may, at its own discretion, file a grievance in response to evidence of a possible violation of the CBA. He then asked Dr. Pesta to keep him apprised of any significant developments in his case, and to coordinate with him regarding availability for any meetings where he would like union representation. (Union Exh. 11).

In his ULP Charge, Dr. Pesta referenced this email and, in bold, stated that the CSU-AAUP did not do this. He stated that the union would not give him "simple feedback" as to whether they thought the just cause clause was violated here. (See ULP Charge attachment, pg. 5). However, Dr. Pesta clearly did not understand the meaning of "just cause." At this point, there was only an investigation being conducted under the University's Research Misconduct Policy. There had been no findings and no conclusions rendered. There was no discipline issued. The "just cause" language in the CBA, and in any CBA, does not apply until discipline is rendered. (Union Exh. 8, para. 6).

On September 2, 2021, Dr. Ward sent an email to Dr. Pesta, with a copy to his private counsel, Mr. Carson, letting him know that the Investigation Committee would like to schedule an initial interview with Dr. Pesta in the near term. He said that the committee preferred to do this in-person, but would agree to do it by Zoom if requested. He advised Dr. Pesta that he was allowed to have the assistance of private legal counsel or another advisor during the interview. He also stated that the meeting would be recorded and a transcript would be made, and that the transcript would be available for his review and corrections. Dr. Ward did not include the CSU-AAUP in his correspondence. (Union Exh. 12).

Dr. Pesta responded and said that, while all the days/times offered worked, he preferred the interview to be conducted over Zoom. He also asked Dr. Ward for a copy of the committee's documents. Dr. Pesta likewise did not copy the CSU-AAUP on his response and did not coordinate with Dr. Browning on availability. (Union Exh. 12).

The meeting was then scheduled for September 7, 2021. Dr. Ward stated that he had included all the documents in the possession of the Committee on August 17, 2021 except whatever he attached to that email. (Union Exh. 12).

Only after the meeting was scheduled did Dr. Pesta inform Dr. Browning, Dr. Allensworth-Davies, and Dr. Charles of the date. He did not invite them to attend the September 7, 2021 interview. He also did not share any of the underlying documents with them. However, his private attorney, Mr. Carson, had been copied on all the emails between Dr. Pesta and Dr. Ward and, as previously stated to the CSU-AAUP, Mr. Carson

Wed, 05/25/2022 1:26:53 AM SERB

Muskovitz
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 9 of 21

was going to represent Dr. Pesta during the interview. (Union Exh. 12; Union Exh. 8, para. 7).

In his ULP Charge, Dr. Pesta alleges that the CSU-AAUP was not present for the September 7, 2021 interview even though he had asked for representation back on August 23, 2021. (ULP Charge attachment, pg. 6). What Dr. Pesta did not include in his ULP Charge was the correspondence he had with Dr. Browning, in which Dr. Browning said he was not available on September 7th and asked if the interview could be conducted on a different day. Dr. Pesta responded to Dr. Browning and said that the notice was somewhat short, and with a holiday in between. He then said that the interview would be recorded and asked if that would be helpful. Dr. Browning responded by saying "If you're comfortable with that, yes." Dr. Pesta said that the September 7, 2021 interview was only the first of many interview sessions the Committee wanted to conduct. Dr. Browning then stated "Got it." (Union Exh. 13).

Clearly, Dr. Pesta is leaving out pertinent facts from his ULP Charge when he accuses the CSU-AAUP of not attending that meeting.

The September 7, 2021 interview was recorded and transcribed. (Union Exh. 5, pp. 27-51). Mr. Carson was present and identified himself as Dr. Pesta's attorney. (Union Exh. 5, pg. 28). At the beginning of the interview, Dr. Pesta presented the Committee with an opening statement that he had prepared but stated he did not want to read it. The Committee agreed to let him present it that way. (Union Exh. 5, pg. 30). The first sentence of his opening statement was "I want to apologize for the trouble I got CSU into with the NIH." (Union Exh. 5, pg. 26). Dr. Pesta then answered questions from the Committee members and discussed his research.

On September 9, 2021, Dr. Browning reached out to Dr. Pesta and asked him if the meeting occurred and how it went. Dr. Pesta stated that he thought the meeting went well and that he had asked Dr. Ward for the Zoom link so he could forward it to Dr. Browning. Dr. Browning said "No worries, thanks for the update!" (Union Exh. 14). This correspondence was also omitted from the ULP Charge.

On September 12, 2021, Dr. Pesta provided a copy of the recorded interview to Dr. Browning. On September 15, 2021, Dr. Browning responded and said that he had viewed the recording and that he did not find any contractual, policy, or procedural concerns. Dr. Pesta responded and said "What about the just cause clause?" Dr. Browning responded and said that the "just cause" clause has to do with sanctions. Do any sanctions match the determined offense? He stated that eventually the Committee will decide if he had committed academic misconduct and that the Provost would decide on a sanction, if any.

Muskovitz
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 10 of 21

It is only at that point that the “just cause” language comes into play. (Union Exh. 14). Dr. Allensworth-Davies then responded and said that Dr. Browning’s assessment was correct. He explained to Dr. Pesta that if the administration decided to pursue sanction or dismissal, then under the CBA, a committee with an equal number of representatives from the administration and from faculty union members would determine if there was just cause for the proposed action. Dr. Pesta responded with “Thank you.” (Union Exh. 14).

In his ULP Charge, Dr. Pesta misrepresents the committee that Dr. Allensworth-Davies described. Dr. Pesta repeatedly calls it a “management committee.” Dr. Pesta also asks why the CSU-AAUP does not conduct its own investigation. (ULP Charge attachment, pg. 7). However, the committee that Dr. Allensworth-Davies described is the ad hoc committee from Article 8 of the CBA. (Union Exh. 1, pg. 7; Union Exh. 3, pg. 5). It is not a “management committee” but is a committee made up of equal Union and management representatives. In addition, the CSU-AAUP does not have the authority to conduct a formal investigation similar to that being conducted by the Investigation Committee created under the University’s Research Misconduct Policy. (Union Exh. 8, para. 8). This is simply Dr. Pesta’s attempt to blame the CSU-AAUP for his own misconduct.

Between September 16, 2021, when Dr. Pesta said “Thank you” to Dr. Browning, Dr. Allensworth-Davies, and Dr. Charles, and December 6, 2021, there was no communication from Dr. Pesta to the CSU-AAUP. (Union Exh. 8, para. 9).

During that time, however, the Investigation Committee interviewed Dr. Bird, Dr. Carlson, and Dr. Townsend (three of the four graduate researchers), as well as Dr. Taylor from UCLA. (Union Exh. 5, pp. 5, 14-15, 17-19). These interviews were also recorded and transcribed, and the transcripts were presented to Dr. Pesta for his review and response. On October 11, 2021, Dr. Pesta provided his response to the interviews. (Union Exh. 5, pp. 85-88). Also on October 11, 2021, Dr. Pesta was interviewed by the Investigation Committee for a second time. (Union Exh. 5, pp. 89-130). As with the first interview, Dr. Ward advised Dr. Pesta that the interview was being recorded, that it would be transcribed, and that he [Dr. Pesta] would have an opportunity to correct the transcript and address any mistakes or needed clarifications. (Union Exh. 5, pg. 89). Again, the interview was conducted via Zoom and Mr. Carson was present to represent Dr. Pesta. (Union Exh. 5, pp. 89, 129).

Dr. Pesta did not inform the CSU-AAUP about this interview, did not invite them to attend, and did not invite them to review the transcript. (Union Exh. 8, para. 10).

Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
& Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 11 of 21

After these interviews were conducted, the Investigation Committee provided a draft of its report to Dr. Pesta and gave him the opportunity to provide a rebuttal to the draft. On December 2, 2021, Dr. Pesta provided a rebuttal. Then on December 3, 2021, Dr. Pesta revised the rebuttal to remove repeated texts. (Union Exh. 5, pp. 152-162). Dr. Pesta did not have any communication with the CSU-AAUP related to the drafting or submission of his rebuttal. He also did not, at that time, provide a copy of the draft to the CSU-AAUP. (Union Exh. 8, para. 11).

On December 6, 2021, after submitting his rebuttal, Dr. Pesta sent an email to Dr. Browning telling him that the Investigation Committee had found him in violation of the University's Research Misconduct Policy and that the Committee's report would be sent to the Provost for a recommendation of discipline. Dr. Browning responded and said that, if he wanted and he was comfortable with that, he could share the Report with him. Dr. Browning also said that a key factor was that discipline must be progressive and corrective, rather than punitive. (ULP Charge attachment, pp. 7-8). At the time he made this statement, Dr. Browning had not received a copy of the draft Report, and had no access to any of the findings of the Investigation Committee. This was the first time Dr. Pesta had communicated with Dr. Browning since September 16, 2021. (Union Exh. 8, para. 12).

Also on December 6, 2021, the CSU-AAUP Executive Committee was informed about the case by Dr. Browning. When these cases are discussed, the specific faculty member is not identified, and the case is described in general terms. (Union Exh. 7, para. 5; Union Exh. 8, para. 13).

In his ULP Charge, Dr. Pesta blames the Union for not filing a grievance at this point. (ULP Charge attachment, pg. 8). However, the Report of the Investigation Committee was not final at that point. The Provost had not recommended any discipline. There was nothing to grieve, although the matter had been brought to the attention of the Executive Committee. (Union Exh. 7, para. 6; Union Exh. 8, para. 14).

On January 13, 2022, the Investigation Committee issued its Final Report. In the Final Report, the Committee found, by clear and convincing evidence, that Dr. Pesta had committed serious academic research misconduct in four distinct areas:

1. Unauthorized use of NIH controlled-access data;
2. Published research findings despite NIH explicitly stating that Dr. Pesta and his colleagues did not have approval to do so;
3. Failure to receive IRB [Institutional Review Board] approval for NIH data that went beyond what was outlined in a Data Use Certificate Agreement; and

Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 12 of 21

4. Unauthorized research funding for Cleveland State University research efforts without CSU approval.

The Investigation Committee also identified two remaining areas of concern that were beyond the scope of the Committee but that may need further review, namely:

1. Possible Ohio ethics law violations as a public employee with respect to Dr. Pesta's use of Human Phenome Diversity Foundation, LLC funds; and
2. Ongoing work with research team members who may be violating data use certification agreements and NIIH research regulations.

(Union Exh. 5, pp. 1, 9-10).

On January 13, 2022, [then] Provost Laura Bloomberg recommended termination. (Union Exh. 15). She copied her letter to CSU-AAUP President Allensworth-Davies. Dr. Bloomberg's letter is eight pages long, and sets out, in detail, her findings. She notes that, as a consequence of the NIIH findings, Dr. Pesta's access to NIH data was revoked for three years. She stated: "This is the most serious and longest ban NIH has ever issued on a controlled access dataset." In fact, the longest ban that the NIIH had ever issued, prior to Dr. Pesta, was for six months. She stated that NIH has noted the three-year sanction and that he, and by extension, Cleveland State University, were found in violation of NIIH policies. She also noted that this "has serious implications for our research reputation and success as a University." (Union Exh. 15, pg. 2).

Dr. Bloomberg concluded that, based on her review of the NIIH investigation and the Final Report of the Investigation Committee, including materials that Dr. Pesta provided, she concurred with the Committee's findings. (Union Exh. 15, pg. 2). She stated:

In arriving at this conclusion, I considered carefully your own testimony to the committee. In some parts of your testimony I note that you acknowledge committing the violation. I do not know if these violations were committed knowingly or recklessly. I do not distinguish between these two states of mind in interpreting the actions of a tenured full professor who should be well informed about appropriate research practices prior to seeking to serve as a Principal Investigator on a research project. In other parts of your testimony you provide rationale that the violation was either overblown or it was simply not your fault. I do not find those excuses compelling and therefore find you responsible for the four violations listed [in the Final

Wed, 05/25/2022 11:26:53 AM SERB

MUSKOVITZ
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 13 of 21

Report] for the same reason as the committee. I adopt and incorporate their findings and conclusions in whole.

(Union Exh. 15, pg. 2).

Dr. Bloomberg goes on to explain why her findings do not involve a question of academic freedom. She stated:

You have violated the core research integrity guidelines that you agreed to follow by virtue of completing Principal Investigator (PI) training at CSU and subsequently identifying yourself as a PI on proposals for external funding. You have violated the standards of research integrity that we uphold in both our research policies and CSU's tenure standards which you, by virtue of accepting tenure at Cleveland State University, have also pledged to follow.

(Union Exh. 15, pg. 3).

Dr. Bloomberg then described the disciplinary process in Article 8 of the CBA and attached a copy of Article 8 to her letter. As she explained to Dr. Pesta, Article 8.2 of the CBA requires the convening of an ad hoc committee. The ad hoc committee is comprised of three members of the bargaining unit and three members of the academic administration with tenured faculty status appointed jointly by the University's Chief Academic Officer and the President of the CSU-AAUP. As she explained, Dr. Pesta will have the opportunity to respond to the charges and the CSU-AAUP has a right to attend and participate in the ad hoc committee hearing. Following the ad hoc committee hearing, the committee has 15 working days to issue their recommendation and she then has 10 days to decide whether to implement disciplinary action. Finally, she informed Dr. Pesta that she would issue her decision within ten days of receipt of the ad hoc committee's findings. (Union Exh. 15, pg. 7).

On January 14, 2022, Interim Vice Provost for Faculty Affairs Cheryl Bracken contacted Dr. Pesta regarding the ad hoc committee. Dr. Pesta responded and asked her if she could explain what would be happening at the meeting. Dr. Bracken explained that the process was outlined in Article 8 of the CBA and that a copy of Article 8 was included in Dr. Bloomberg's letter. She also stated that Dr. Browning (who she understood to be Dr. Pesta's AAUP representative) would also be present. Dr. Pesta responded with "Thank you!" Dr. Browning was copied on all these exchanges. (Union Exh. 16).

Following the January 14, 2022 email exchange there was back-and-forth on scheduling the hearing and whether it would be in person or over Zoom. Then Dr. Pesta

Wed, 05/25/2022 11:26:53 AM SERB

MUSKOVITZ
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 14 of 21

asked Dr. Bracken if he could have his personal lawyer present. Dr. Bracken said that the CBA only allows him and his AAUP representative to be present. Dr. Pesta responded and said “no problem on the lawyer issue” and that he had “personal reasons” for requesting a Zoom meeting. (Union Exh. 17).

On January 20, 2022, Dr. Pesta sent an email to Dr. Browning asking if he or the AAUP had any thoughts on his case, given that the documents were out. Dr. Browning responded and said he had read the documents but, given that there are 170 pages, he did not study them. (See Union Exh. 5). He also reminded Dr. Pesta that the Union’s interest was to make sure that the process carefully follows the provisions in the CBA and the personnel policies. He advised Dr. Pesta that the only opinions that matter, at this point, are those of the ad hoc committee. He also stated that he thinks Mr. Carson (Dr. Pesta’s personal attorney who had been working with him throughout the NIII investigation and the University’s investigation) is in a better position to advise him on how to respond to the charges. Finally, he informed Dr. Pesta that he would be attending the ad hoc committee meeting to observe and that, if they were deviating from the procedure, he would speak up. Also, he said that if Dr. Pesta had any questions during the meeting regarding procedure, he should feel free to ask him. (Union Exh. 18).

In Dr. Pesta’s ULP attachment, he claimed incorrectly, again, that the ad hoc committee was a management committee. (See ULP Charge attachment, pp. 8-9). However, Dr. Pesta was clearly aware that the ad hoc committee was a joint labor/management committee, and was designed to be as impartial as possible to review any recommendations for sanction or dismissal from the Provost.

Dr. Pesta responded and, again, asked Dr. Browning his opinion of whether there would be “just cause” in the event he was terminated. Dr. Browning responded that he was not in a position to make a judgment at that time on “just cause.” That was the role of the ad hoc committee. He then said that, after the Provost responds to the committee, he would share the basic findings from the ad hoc committee, along with the Provost’s response, with the CSU-AAUP Executive Committee, which is the body who can file a Level 4 grievance directly with the Provost. He then directed Dr. Pesta to Section 8.4 and 9.16 of the CBA. Dr. Pesta then responded with “Thank you Birch, I do appreciate it.” (Union Exh. 18).

On January 25, 2022, Dr. Pesta submitted a 19-page Reply to the Provost’s Decision Letter to each member of the ad hoc committee. (Union Exh. 19).

Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 15 of 21

The ad hoc committee met on January 28, 2022. Dr. Pesta, along with his AAUP representative, Dr. Browning, were present. At Dr. Pesta's request, the meeting was conducted over Zoom. (Union Exh. 8, para. 15; Union Exh. 17).

During the ad hoc committee meeting, Dr. Pesta tried, unsuccessfully, to share a PowerPoint, which he identified as his opening statement. Immediately following the meeting, Dr. Pesta emailed the PowerPoint to everyone in attendance. The PowerPoint did not rebut the charges, but simply said that he did not mean to do what he was accused of doing and that he was sorry. (Union Exh. 20).

Then on February 7, 2022, Dr. Pesta sent an email to Dr. Browning, thanking him for participating in the ad hoc committee meeting and apologizing for the delay in reaching out. He then said he did not see any procedural issues and was wondering what the AAUP's opinion was on that. Dr. Browning responded that he likewise did not see any procedural issues. Dr. Browning then advised Dr. Pesta that, when he received the response from the ad hoc committee and then the Provost, he can decide if he wanted to share it with the Executive Committee and that, if the Executive Committee believed that any part of the response was grievable, they could vote to file a grievance. Dr. Pesta then asked who was on the Executive Committee, and Dr. Browning provided him with a link to the list of all Executive Committee members. (Union Exh. 21).

On February 9, 2022, Dr. Browning again updates the Executive Committee about the case but, again, did not identify Dr. Pesta by name. He discussed the process in the CBA in the event that the Provost determined that the faculty member should be terminated and the role that the CSU-AAUP played in that process. (Union Exh. 7, para. 7; Union Exh. 8, para. 16).

On February 14, 2022, Dr. Pesta sent another document, which he titled "Final Considerations" to the ad hoc committee members. (Union Exh. 22).

On February 28, 2022, the ad hoc committee issued its findings. (Union Exh. 23). As can be read in their report, they considered all of the materials presented by Dr. Pesta. They also unanimously found that the allegations did not infringe on Dr. Pesta's academic freedom and that their conclusions were arrived at independent of the content of Dr. Pesta's research. The ad hoc committee then reviewed the four specific findings. They held that the first two findings were substantiated. They found that they related to violations of policy initiated by NIH, and that NIH claimed the sanctions they levied against Dr. Pesta were the most severe ever levied on a principal investigator. The committee noted that these were upheld by NIH, despite Dr. Pesta's appeal. They also agreed with the Provost that the violations "have the potential to seriously impact future interactions between NIH

Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 16 of 21

and CSU” and that the violations directly conflict with the CSU’s Administrative Code, statement on Professional Ethics and Responsibility, particularly “*responsibility to scholarship and to the institution.*” [Italics in original.] The ad hoc committee also analyzed and addressed findings 3 and 4 and found against Dr. Pesta on those findings as well.

The decision of the ad hoc committee was unanimous. They found that the decision to dismiss Dr. Pesta was warranted based on more than one of the 6 instances noted in Article 8. (Union Exh. 23).

On February 28, 2022, Dr. Bloomberg terminated Dr. Pesta. (Union Exh. 24).

On February 28, 2022, Dr. Pesta forwarded a copy of Dr. Bloomberg’s letter to Dr. Browning and asked if the AAUP would handle his grievance. Dr. Browning asked him if the materials could be forwarded to the Executive Committee. Dr. Pesta stated that, yes, he did consent to the Executive Committee reviewing the materials. He also said that his primary defense was that his arguments and explanations were “simply being ignored.” (Union Exh. 25).

On March 2, 2022, Dr. Pesta sent an email to Dr. Browning and Dr. Allensworth-Davies saying he was trying to figure out his next step. He asked if the AAUP thought he had a case. He told Dr. Browning and Dr. Allensworth-Davies that they “may be straight shooters here.” He noted that the ad hoc committee members “overwhelmingly rejected my arguments (thought I believe they didn’t understand the issues, nor did the Provost), so I guess it’s likely you might too.” He asked if the AAUP would file for (expedited) arbitration. [There are no provisions for expedited arbitration in the CBA.] He also asked about his need to clear out his office and wanted to retain his CSU email access through an appeal. (Union Exh. 26).

Following the February 28 and March 2, 2022 emails from Dr. Pesta, Dr. Browning and Dr. Allensworth-Davies discussed the case in depth with members of the CSU-AAUP Executive Committee. They decided that the Union would not prevail in arbitration given the unanimous findings of the ad hoc committee and the fact that Dr. Pesta’s defenses were simply that everyone along the lines misunderstood the situation. Dr. Pesta blamed the researchers and other academics who initially raised the issues about his research misconduct, the investigators at the NIH, the University’s Investigation Committee, the Provost, and the entire ad hoc committee. His defenses did not address the merits of the allegations and mainly included simple denials that he meant to do anything wrong. Given the level of due process that Dr. Pesta had throughout the process, his failure to rebut the charges, the seriousness of the charges, and the overwhelming evidence against him, the



Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 17 of 21

Executive Committee determined that, on the merits, they would not be successful in arbitration. Dr. Browning and Dr. Allensworth-Davies then looked to see if there were any procedural violations which might be grievable and found none. Dr. Pesta was provided with every protection in the CBA. (Union Exh. 7, para. 8; Union Exh. 8, para. 17).

On March 4, 2022, Dr. Browning responded to Dr. Pesta and said that he and Dr. Allensworth-Davies had carefully reviewed the entirety of the process. He said that the CSU-AAUP was not in a position to substitute their judgment for that of the various committees nor the Provost, and that they did not see a contract process violation. As a result, they would not be filing a grievance in this case. Dr. Pesta responded with a simple "Received. Thank you." to the email. (Union Exh. 27).

On April 22, 2022, Dr. Pesta filed the instant ULP.

C. LAW AND ARGUMENT

1. The CSU-AAUP Did Not Fail in Its Duty of Fair Representation.

Dr. Pesta, as the Charging Party, bears the burden to prove the Union failed in its duty of fair representation. *In re OCSEA/AFSCME Local 11*, SERB 98-010 (7-22-98). R.C. 4117.11 (B)(6) states:

(B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

(6) Fail to fairly represent all public employees in a bargaining unit.

A breach of the statutory duty of fair representation occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *In re OCSEA/AFSCME Local 11*, SERB 98-010 (7-22-98).

A union's actions are not arbitrary if the union has a "rational basis" for its position. *In re Ohio Nurses Assn. and Univ. of Cincinnati Hospital*, SERB 96-012 (8-29-99). The term "arbitrary" amounts to more than "simple negligence," an "honest mistake" or "misjudgment." *In re Ohio Civil Service Employees Assn., Local 11*, SERB 95-020, (11-8-95). Arbitrary action includes conduct which fails "to take a basic and required step without justification or viable excuse." *In re OCSEA/AFSCME Local 11*, SERB 98-010 (7-22-98); *In re OCSEA/AFSME, Local 11*, SERB 99-009 (5-22-99).

Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 18 of 21

In this case, Dr. Pesta had a full opportunity to explain his actions related to his research and failed to do so. He had full due process. He was represented by his private attorney, at his option, throughout the investigation process. The Investigation Committee followed the procedures outlined in the University's Research Misconduct Policy in every instance. More importantly, after the Provost recommended termination, based on the Final Report from the Investigation Committee, Dr. Pesta had the opportunity to address the allegations to a labor/management committee that had equal representation of CSU-AAUP and management representation. Throughout his ULP, Dr. Pesta calls the ad hoc committee a "management committee." However, that is his new attempt to shift blame for his actions. The ad hoc committee is not a "management committee." It is a part of the discipline process in the CBA specifically to allow the parties a neutral mechanism to address any proposed sanctions and/or dismissal from the Provost.

The CSU-AAUP fulfilled its responsibility to fairly represent Dr. Pesta and did not act arbitrarily in its determination to not appeal his case.

In addition, a union acts with discriminatory intent only if its actions are "based on irrelevant and invidious considerations." *In re Ohio Nurses Assn. and Univ. of Cincinnati Hospital*, SERB 96-012 (8-29-96). Bad faith is present where a union acts with "hostility or malicious dishonesty." *Id.* at *6.

In this case, there is no evidence that the CSU-AAUP acted with hostility or malicious intent. Dr. Pesta has presented no evidence of this in his ULP Charge.

2. The Article 8 Ad Hoc Committee is a Neutral Decision-Making Body that Fairly Evaluated the Sanction on the Merits.

Article 8 of the CBA includes a step in the discipline process under which the Provost must convene an ad hoc committee comprised of three bargaining unit faculty and three administrators with faculty rank to conduct a hearing on any proposed sanction. The intent of this step is to provide a step in which the faculty member can be heard, the allegations addressed, and a resolution proposed. It has been used successfully to avoid arbitration of discipline for many years. If the ad hoc committee is split in its findings, or if the Provost imposes disciplinary action which exceeds the recommendation of the ad hoc committee, then the CSU-AAUP will have a greater chance of prevailing in a subsequent arbitration. However, if the ad hoc committee's decision is unanimous and if the Provost's decision is consistent with the recommendation of the ad hoc committee, then the likelihood of success in a subsequent arbitration is low, absent procedural irregularities. That is what factored into the decision by the Executive Committee of the CSU-AAUP

Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
& Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 19 of 21

when they determined not to grieve and arbitrate Dr. Pesta's termination. (Union Exh. 7, para. 9; Union Exh. 8, para. 18).

There are very few comparable cases for faculty because it is rare for faculty to be sanctioned under Article 8. However, there have been three other cases in the past six years. The three cases are outlined below:

Case 1: This case involved a faculty member in the College of Science and Health Professionals. On April 28, 2021, the Provost recommended dismissal of the faculty member. An ad hoc committee was formed and a hearing held on May 21, 2021. In this case, the allegations involved student complaints about the faculty member's teaching, interactions with students, and unprofessional behavior in the classroom. These complaints include discrepancies between the course syllabus and methods to evaluate student performance, disrespect toward students, ridiculing students for performing poorly, impatience and dismissive behavior in response to student questions or concerns, and failure to accommodate student learning needs. After the hearing, the ad hoc committee's determination was as follows:

While the entire committee found [the faculty member's] conduct in class and in the lab unacceptable, there was not majority support for the Provost's recommendation for dismissal due to the lack of progressive discipline enacted by the Administration as articulated in the CSU-AAUP Collective Bargaining Agreement. Thus, the committee majority recommends that the sanction of unpaid leave from the University for the period of one year be imposed.

In this case, after the ad hoc committee issued its report, and before the Provost issued the sanction, the faculty member voluntarily resigned. As a result, the CSU-AAUP did not have to make a determination as to whether to grieve and arbitrate the sanction. However, if the Provost had issued a sanction as recommended by the ad hoc committee of a one-year suspension, that would have carried far greater weight than had the Provost issued a sanction of dismissal after the ad hoc committee rejected that sanction as too severe. In other words, the ad hoc committee structure worked in providing a review by a joint labor/management committee after the Provost recommended discipline and before the sanction was issued. It also shows that the ad hoc committee structure does not "rubber stamp" recommendations by the Provost but acts as an independent body to evaluation behavior and proposed sanctions from that behavior.

(Union Exh. 8, para. 19).

Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 20 of 21

Case 2: This case involved a faculty member in the College of Liberal Arts and Social Sciences. This case falls under the new language in Article 8 of the 2021-2022 CBA which limits the administration's ability to remove a faculty member from their classroom responsibilities without going through the Article 8 process. In this case, the faculty member canceled numerous graduate classes in the fall 2021 semester without informing their chair or arranging for the classes to be covered by another faculty member as required by the CBA. During the spring semester, the faculty member continued to cancel classes without informing the department chair, arranging for course coverage, or applying for medical leave. This was accompanied by the faculty member refusing to discuss these issues with the college leadership. Because of the new language in Article 8, the Provost recommended a suspension with pay, and an ad hoc committee was created. The ad hoc committee unanimously recommended a suspension with pay through the end of the Spring 2022 semester in order to prevent irreparable academic harm to students. The Provost accepted this recommendation and has issued a suspension with pay through the end of the current semester.

(Union Exh. 8, para.20).

Case 3: This case involved a faculty member in the College of Liberal Arts and Social Sciences. In this case, there were numerous complaints about the faculty member's treatment of student in their classes. The University's Office of Institutional Equity (OIE) conducted an investigation of the faculty member's treatment of students and particularly the treatment of students registered with the University's Office of Disability Services. The OIE issued a report on December 21, 2021, which substantiated the claim of discrimination against students with disabilities and found that the faculty member created a hostile learning environment in the classroom. The Provost then recommended a suspension without pay for the remainder of the Spring 2022 semester and for the entire 2022-2023 academic year. An Article 8 ad hoc committee was created and a hearing held. The ad hoc committee disagreed with the Provost's recommendation and found that the suspension was not warranted. After receiving the ad hoc committee's recommendation, the Provost retracted the recommended suspension and, instead, issued a written warning.

(Union Exh. 8, para. 21).

As the forgoing shows, discipline is rare, but when it occurs, the ad hoc committee process has been successful in allowing a check on the Provost's recommendation and avoiding the need for arbitration. When the ad hoc committee has recommended a lesser sanction, then the Provost has retracted the recommended discipline and accepted the findings of the ad hoc committee. This also shows that the ad hoc committee is not a "management committee" but is a joint labor/management committee, with equal

Wed, 05/25/2022 11:26:53 AM SERB

Muskovitz
&
Lemmerbrock LLC

Ms. Judy Knapp
May 25, 2022
Page 21 of 21

representation from the Union and the administration and independently reviews recommendations for discipline.

In the case of Dr. Pesta, the ad hoc committee was unanimous in its recommendation that he committed serious research misconduct and that the sanction of dismissal was warranted. As such, the CSU-AAUP exercised its discretion to accept those findings when it decided not to file a grievance in this case.

D. CONCLUSION

For the foregoing reasons, CSU-AAUP respectfully submits that the ULP charge should be dismissed in its entirety. There are no related court actions or grievances. If you have any further questions or concerns regarding CSU-AAUP's position on Dr. Pesta's Unfair Labor Practice Charge, or if the Union can be of any further assistance in your investigation, please contact me.

Very truly yours,

MUSKOVITZ & LEMMERBROCK, LLC

Susannah Muskovitz

SM:CB/11156
Encl.

